STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS WRAY and CATHY L. WRAY,

Plaintiffs-Appellants,

v

CITY OF LANSING,

Defendant-Appellee.

UNPUBLISHED
March 15, 2007

No. 272868
Ingham Circuit Court
LC No. 05-001409-CH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

On December 5, 2005, plaintiffs filed a complaint alleging denial of due process, gross negligence, and conversion. Plaintiffs, the owners of real property located at 1115 E. Oakland Avenue in Lansing, alleged that the residence was unlawfully demolished. It was asserted that defendant issued a make safe or demolish order on July 27, 2003, with demolition to occur on August 28, 2003. Plaintiffs alleged that the property was purchased to generate income, and significant improvements and modifications occurred such that defendant agreed to a series of extensions to the make safe or demolish order. In order to facilitate the repairs, plaintiffs obtained a mortgage in November 2004. This mortgage purportedly allowed plaintiffs to retain a contractor to finish any remaining repairs. Plaintiff continued to communicate with a representative of the city in order to obtain additional extensions from the make safe or demolish order. However, it was asserted that this representative misrepresented the condition of the property to others, and the demolish order was not lifted, resulting in the destruction of the home. Plaintiffs contended that the misrepresentations by city officials deprived them of due process of law and resulted in an unlawful taking of their property.

On January 5, 2006, defendant filed a motion for summary disposition based on MCR 2.116(C)(4), (7), and (8). In the motion and brief, defendant asserted that the property was demolished pursuant to a city resolution, and plaintiffs failed to file a claim of appeal from the statute allowing for regulation and demolition of properties. Therefore, it was asserted that the circuit court lacked subject matter jurisdiction when plaintiffs failed to exhaust their administrative remedies. Defendant also requested summary disposition because plaintiffs failed to indicate how their due process rights were violated in light of the two-year history of the case in which defendant repeatedly advised plaintiffs of the need to make the property safe. Lastly,

defendant asserted that the gross negligence and conversion claims were barred by governmental immunity.

On March 7, 2006, plaintiffs filed a brief in opposition to the dispositive motion. Plaintiffs asserted that they were deprived due process of law because they were not given notice of the right to a hearing between the time scheduled for demolition and the actual demolition. It was further asserted that the request for an extension was denied "with absolutely no notice of their right to an appeal, how to file an appeal, or the timeframe in which they needed to file the appeal." Plaintiffs also asserted that immunity could not be applied to a taking claim. Lastly, plaintiffs asserted that the trial court had original subject matter jurisdiction or alternatively that the failure to timely file an appeal was excusable neglect based on defendant's misrepresentations of the property's status.

On June 21, 2006, the trial court heard oral arguments regarding the motion. The trial court read into the record the notice dates given to plaintiffs regarding the time frame for complying with the make safe or demolish order, before holding:

> So I think that Plaintiff [sic] had had notice and an opportunity to come in. And if they didn't know what their appellate rights were up to this two years, then they just – they sat on their rights. And they were – they were familiar with the demolition project as it went on.
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> They were granted four separate extensions, and the house was – it wasn't demolished until April of '05, but they were given numerous notifications.
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> And also, they really haven't addressed the issue of the governmental immunity. They're alleging an action for trebled damages for conversion. That's a tort, clearly covered under the governmental immunity statute. So the court finds there's no genuine issue of material fact, and grants the Defendant's motion as a matter of law, the judgment as a matter of law.

Plaintiffs appeal as of right from this ruling.

Appellate review of a summary disposition decision is de novo. *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion, shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999). Mere conclusory allegations that are devoid of detail do not satisfy the burden in opposing a motion for summary disposition. *Quinto, supra*.

Constitutional issues are reviewed de novo as a matter of law. *Studier v Michigan Public School Employees' Retirement Bd*, 472 Mich 642, 649; 698 NW2d 350 (2005). Issues of

statutory construction present questions of law that are reviewed de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002). The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent – the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000). Under the plain meaning rule, "courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would frustrate the legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

In the present case, plaintiffs assert that they were denied due process of law because of the failure to provide necessary notice regarding the status of the property and demolition. However, the notice obligations imposed upon a city with regard to regulatory enforcement of a dangerous building is set forth in MCL 125.540 and provides:

> (1) Notwithstanding any other provision of this act, if a building or structure is found to be a dangerous building, the enforcing agency shall issue a notice that the building or structure is a dangerous building.
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> Persons who may be served notice. (2) The notice shall be served on the owner, agent, or lessee that is registered with the enforcing agency under section 125. If an owner, agent, or lessee is not registered under section 125, the notice shall be served on each owner of or party in interest in the building or structure in whose name the property appears on the last local tax assessment records.
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> Contents, notice of hearing. (3) The notice shall specify the time and place of a hearing on whether the building or structure is a dangerous building. The person to whom the notice is directed shall have the opportunity to show cause at the hearing why the hearing officer should not order the building or structure to be demolished, otherwise made safe, or properly maintained.
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> Hearing officer; filing of notice with officer. (4) The hearing officer shall be appointed by the mayor, village president, or township supervisor to serve at his or her pleasure. The hearing officer shall be a person who has expertise in housing matters including, but not limited to, an engineer, architect, building contractor, building inspector, or member of a community housing organization. An employee of the enforcing agency shall not be appointed as hearing officer. The enforcing agency shall file a copy of the notice that the building or structure is a dangerous building with the hearing officer.
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> Notice in writing; service. (5) The notice shall be in writing and shall be served upon the person to whom the notice is directed either personally or by certified mail, return receipt requested, addressed to the owner or party in interest at the address shown on the tax records. If a notice is served on a person by certified mail, a copy of the notice shall also be posted upon a conspicuous part of the

> building or structure. The notice shall be served upon the owner or party in interest at least 10 days before the date of the hearing included in the notice.

The sole notice provision addressing dangerous buildings was satisfied, and therefore, the trial court did not err in granting summary disposition of the due process claim. Review of the documentation filed in the trial court reveals an extensive history regarding this property. On April 3, 2003, the property was inspected, and it was concluded that the property was unsafe and dangerous. Plaintiffs were required to bring the property into compliance by June 4, 2003. This notice also provided that the code compliance officer had to be contacted seven days before the compliance due date to inspect the corrections or to obtain an authorized extension. On July 8, 2003, defendant's representative sent plaintiffs a letter indicating that a hearing was scheduled before the demolition hearing officer on July 24, 2003. At that time, interested parties had to take exception to the dangerous building determination or show cause why the building should not be demolished or made safe. The notice was sent by certified mail and was also posted at the subject premises.

On July 24, 2003, the case was presented to the demolition board. There was no indication that plaintiffs had contacted the board or appeared. It was determined that the state equalized value of the property was $14,000, the land value was $1,300, the building value was $12,700, and the estimated repair cost was $18,071. The property was vacant for the last 180 days, and no permits had been pulled to commence repairs. Consequently, it was ordered that the property be made safe or demolished by August 28, 2003. Plaintiff Douglas Wray acknowledged receipt of the notice that was sent by certified mail. Additionally, the order of demolition was posted on the premises on July 30, 2003.

On October 2, 2003, defendant sent plaintiffs notice that the property would be demolished as a dangerous building. A hearing was scheduled for October 20, 2003, during which an interested party could take exception to the demolition order or show cause why the property should not be ordered demolished. The mailing was returned as unclaimed despite the fact that it was mailed to the same address where plaintiff Douglas Wray had previously received a notice. In any event, a notice of public hearing was posted on the premises on October 6, 2003. Review of the minutes of the October20, 2003 meeting reveals that the issue of the order to make safe or demolish the subject property was referred to the committed on public safety. On December 1, 2003, after reviewing the recommendation of the code compliance manager, the city passed a resolution that gave plaintiffs until June 1, 2004, to make the necessary repairs to the subject property. However, this resolution contained the provision that plaintiffs had to demonstrate to the satisfaction of the city manager that financing was available to complete the necessary repairs. The owners were also required to provide a progress report regarding an agreed upon work schedule and to pull appropriate permits within 30 days. If the appropriate permits were not pulled by December 31, 2003, the code compliance manager was directed to proceed to demolition.

On December 1, 2003, defendant sent a letter to plaintiffs delineating the prior history of the case and the terms of the resolution. Plaintiffs were instructed that proof of financing, approved work schedule, and required permits had to be obtained by December 31, 2003. Additionally, estimates and proof of financing had to be submitted by December 15, 2003. The letter was sent via certified mail and was also posted on the property on December 2, 2003.

On March 8, 2004, the city passed another resolution with regard to the subject property. This resolution provided that the committee on public safety concurred with the code compliance manager's decision to grant an extension to plaintiffs to complete necessary repairs by May 7, 2004. This notice again advised plaintiffs that the failure to comply would result in proceeding to demolition of the property. A letter dated March 12, 2004, delineating the terms of the resolution was sent to plaintiffs. The resolution was also posted on the property on March 15, 2004. This deadline apparently was not met because another letter was prepared to plaintiffs dated May 25, 2004.[1] This letter provided that another extension request had been received. Rather than address the extension, the matter was tabled to allow plaintiffs time to pull all remaining permits and to provide proof of financing. If the conditions were satisfied, an extension to August 15, 2004, would be granted. If the conditions were not met by June 2, 2004, the property had to be made safe or demolished within 60 days.

On August 19, 2004, the committee on public safety held a meeting. The committee learned that the conditions supporting the last extension had not been satisfied. It was reported that there had been no communication with the owner since the May 19, 2004 committee meeting. The letter delineating the terms for the extension was mailed on May 25, 2004. As of July 21, 2004, no permits to perform repairs to the property had been obtained. The committee advised defendant's representative to notify plaintiffs of the demolition. On September 1, 2004,

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[1] This letter was prepared after the council meeting on May 19, 2004. Although plaintiffs were not claiming the majority of the certified letters mailed, plaintiff Douglas did appear at this meeting. The notes of the meeting provide as follows:

Mr. Wray appeared before the committed in support of an extension of the make safe or demolish of the property at 115 E. Oakland.

[Defendant's representative] reported that this is a very complicated situation. She reported on the steps taken and the previous agreements made to make the property safe. She did receive a letter of intent form [sic] from Mr. Wray. There was a building permit pulled but no other permits have been pulled. She reported on the last meeting with the Committee with respect to the ownership of the property and agreements made between the owner, Mr. Ensley, and purchaser by land contract, Mr. Wray.

Mr. Woods, representative of Mr. Ensley, was present to clarify the situation with respect to the agreement between the owners. He explained the situation with respect to the problem with the Title Company and the property being misrepresented. Mr. Ensley and Mr. Wray agreed to share the land contract. The Title Company did not record the land contract and had to reprocess the request completely.

Mr. Wray stated that he pulled permits for this property but because of the problem with the sell [sic] of another property, he did not have the money to continue work on the property. Now, he has the financial means because the other property has been sold. He would like to have an extension on the demolition process.

Mr. Wray agreed to pull all proper permits within the next two weeks.

[Defendant] recommended that if Mr. Wray pulls permits and provides financial means by next Thursday, she would support giving an extension to August 15th contingent on him fulfilling his obligations.

a letter was prepared advising plaintiffs that the committee considered a second extension request. It was concluded that no additional extensions would be granted, and the code compliance office was submitting the demolition for bids. Once the bid was awarded, the demolition would proceed. A telephone number was provided, as it was in all previous notices, to contact the code compliance manager or the secretary who handled the demolition schedules.

On October 6, 2004, the public safety committee met again to discuss the property. Plaintiff Cathy Wray appeared before the committee to appeal for an extension. She asserted that the financial means to finish the property through a loan was available, but the interior of the home would be finished before the loan was finalized. An extension until April 1, 2005 was sought. The code compliance manager reported that the work was partially completed. However, the manager noted that the interior was gutted, and the work performed involved surface items such as painting frames and putting in cupboards. Items were not completed that required the services of a contractor. The extension request was not granted, but was given "pending" status. The committee agreed to work with plaintiffs provided that dates for completion of certain tasks were provided coupled with verification of available financial means. A letter dated October 22, 2004 delineating the committee's decision was prepared. This letter provided that the documentation of the completion dates for various tasks was to be submitted by November 12, 2004, to allow the committee to review the case on November 17, 2004.

On February 3, 2005, the public safety committee met to discuss the property. The code compliance manager noted that, although a work schedule had been received and approved, the work was not completed. The mortgage loan commitment documentation did not satisfy the manager that financing was secured. Permits had been pulled or applied for in 2004, but there was no indication that the permitted work was completed. Additionally, to rehabilitate the property, steel beams and tree root removal was required to save the foundation. The committee also discussed the costs involved in granting extensions in light of the costs of communication and providing notices to plaintiffs. It was determined that no extension would be granted, and demolition would proceed. A letter dated February 8, 2005 was sent to plaintiffs advising them that demolition bids would be sent out immediately and if the bid was awarded, the contractor would proceed. This letter was signed for by plaintiff Cathy Wray on February 11, 2005, and was also posted on the property on February 9, 2005.

Due process enforces the rights enumerated in the Bill of Rights and includes both substantive and procedural due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). Procedural due process serves as a limitation on government action and requires government to institute safeguards in proceedings that affect those rights protected by due process, including life, liberty, or property. *Id*. at 382. Due process is a flexible concept applied to any adjudication of important rights. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002). The procedural protections, which include fundamental fairness, are based on what the individual situation demands. *Id*. Fundamental fairness includes: (1) consideration of the private interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; (3) the probable value of additional or substitute procedures; and (4) the interest of the state or government, including the function involved and the fiscal or administrative burdens imposed by substitute procedures. *Dobrzenski v Dobrzenski*, 208 Mich App 514, 515; 528 NW2d 827 (1995). In civil cases, due process generally requires notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decision maker.

Cummings v Wayne Co, 210 Mich App 249, 253; 533 NW2d 13 (1995). The opportunity to be heard does not require a full trial-like proceeding. *Id.* However, it does require a hearing such that a party has the chance to learn and respond to the evidence. *Id.*

In the present case, defendant repeatedly advised plaintiffs of the status of the make safe or demolish order.[2] Although plaintiffs rarely signed for the certified mail delineating the nature of the proceedings held before the public safety committee or code compliance manager, the record reveals that plaintiffs were provided notice both through mailings and postings on the property itself. Additionally, plaintiffs were not the only interested party to the property, and the other record owner, Mr. Ensley, acknowledged receipt of the updated notices. Plaintiffs were given the opportunity to appear at the update meetings and on occasion did appear. Consequently, plaintiffs were given notice of the standing of the property with the public safety committee for a twenty-two month period. The notice provision of MCL 125.540 was satisfied, and therefore, dismissal of the due process claim was proper.

It should be noted that plaintiffs contend that they were deprived of due process because they were not given notice of any right to appeal the regulatory enforcement provision. However, the statutory appeal provision is found at MCL 125.542 and provides for an appeal to circuit court as follows:

> An owner aggrieved by a final decision or order of the legislative body or the board of appeals under section 141 may appeal the decision or order to the circuit court by filing a petition for an order of superintending control within 20 days from the date of the decision.

Review of the plain language of the appeal provision reveals that it contains no requirement imposing a burden upon the legislative or appellate body to apprise an aggrieved owner of the time frame for filing a claim of appeal. *DiBenedetto, supra*. Furthermore, in light of the extensive contact and leniency afforded plaintiffs by defendant in the twenty-two month period, plaintiffs received all that they were entitled to by law: notice of the nature of the proceedings; a meaningful time and manner for a hearing; and an impartial decision maker. *Cummings, supra*. Under the circumstances, additional requirements that are not contained within the plain language of the statute, MCL 125.542, will not be imposed. Defendant has enforcement authority to take measures to correct dangerous buildings within its borders and order demolition if the owner fails to comply. MCL 125.539 *et seq*.

The decision in *Krohn v City of Saginaw*, 175 Mich App 193; 437 NW2d 260 (1988) should also be noted. In *Krohn*, the plaintiffs were impacted by a decision of the local planning commission with regard to a land use variance involving a land parcel adjoining property owned

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[2] We note that in the public safety committee hearings it was questioned who was the true property owner. There was discussion whether plaintiffs were the true owners because a deed indicated that Mr. Ensley was the property owner. Defendant does not challenge whether plaintiffs are the real party in interest or whether they have standing to pursue this suit, and consequently, we cannot and do not address it.

by the plaintiffs. *Id*. at 194-195. The plaintiffs did not challenge the final decision of the planning commission by filing a claim of appeal. Rather, two months later, the plaintiffs filed an original action in circuit court challenging the decision of the planning commission. This complaint also alleged that due process rights were violated, a taking had occurred, a nuisance per se was created, and a declaration of rights was necessary. On appeal, this Court concluded that dismissal of the claims was appropriate:

> With respect to each of these counts, we believe that they all raise issues relative to the decision of the planning commission and the procedures employed by the planning commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the planning commission or the result reached by the commission. Accordingly, those are issues to be raised in an appeal from the decision of the planning commission. Since plaintiffs were tardy in claiming their appeal, those counts were properly dismissed. [*Id*. at 198.]

In opposition to the motion for summary disposition, plaintiff Douglas Wray submitted an affidavit indicating that he continued to work with defendant's agents who made representations regarding the status of the property contrary to the written documentation. However, plaintiff's affidavit contains hearsay statements regarding the representations. *Maiden, supra*. Moreover, plaintiffs did not allege a claim based on fraud or misrepresentation against the agents who made the statements. Accordingly, the affidavit fails to create a genuine issue of material fact that precludes summary disposition.

The application of governmental immunity presents a question of law that is reviewed de novo. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 604; 528 NW2d 835 (1995). Government employees acting within the scope of their authority are immune from tort liability if their actions are not grossly negligent. *Maiden, supra* at 121-122. Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c). Proof of gross negligence must be through evidence whose content or substance is admissible because of the evidentiary standard required to support a claim of negligence that is higher than a claim of ordinary negligence. *Maiden, supra* at 122-123.[3]

Plaintiffs failed to meet their burden of raising a factual issue with regard to gross negligence. *Maiden, supra*. Plaintiffs blanketly assert that the code compliance manager

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[3] In *Maiden*, the plaintiff's decedent was a paranoid schizophrenic and resident of a state mental health facility. After the decedent struck another resident, he was escorted to his room when he lashed out at employees of the facility. Employees restrained the decedent in such a manner that he died of positional or compression asphyxia. *Id*. at 113-115. The Supreme Court held that there may have been other means of restraining the decedent, but the imminent danger posed by the decedent's behavior required the staff to make split second decisions about how to physically intervene. Under the circumstances, it was concluded that the failure to use other alternatives was not so reckless as to demonstrate a substantial lack of concern for whether injury results.

represented to city officials that the home was not progressing. However, this allegation does not elevate a claim from ordinary negligence to gross negligence. Furthermore, plaintiffs failed to present admissible documentary evidence to create a question of fact regarding the code compliance manager's actions.[4] Accordingly, the trial court did not err in dismissing the claim of gross negligence. Finally, we note that plaintiffs abandoned the dismissal of the conversion claim by giving the issue cursory attention in the brief on appeal. We are not required to search for authority to support a party's position on appeal. *Flint City Council v Michigan*, 253 Mich App 378, 393 n 2; 655 NW2d 604 (2002).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

[4] For example, plaintiff Douglas Wray asserted in an affidavit that he had obtained a mortgage whereas the code compliance manager indicated that it was unclear from documentation submitted whether a mortgage had been obtained. Plaintiffs did not submit the loan documentation presented to the manager or an affidavit from the lender demonstrating that the loan had been obtained. In any event, this allegation alone is insufficient to elevate the cause of action to gross negligence.